Supreme Court, U.S.
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No. 99-1062

In The

Supreme Court of the United States

THE STATE OF ARIZONA,

Petitioner,

v.

FRANCISCO F. LEYVA and SYLVIA LEYVA, husband and wife,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents do not dispute that there is a conflict among the state and federal courts, and admit that the court of appeals applied an incorrect test for the determination of "gross disproportionality." (Opp. at 2-3.) Respondents' opposition relies entirely on the misconception of civil forfeiture as a form of criminal punishment. They assert that the appropriate civil remedy was necessarily limited by the criminal sentence of one of the two Respondents, Mr. Leyva, on two related criminal offenses,[1] and base their opposition on the irrelevant assertion that Mr. Leyva was less criminally culpable than at least one other member of the enterprise.

These arguments are based on the fundamental misconception that the Eighth Amendment Excessive Fines Clause requires civil remedies to be assessed only to the extent that the person on whom they are assessed would be punishable in a criminal sentencing. If this were so, the Constitution would require that the sanction on Mr. Leyva be relatively small,[2] and would forbid any sanction on the uninvolved Mrs. Leyva. In holding that the Excessive Fines Clause applies to some forfeitures in *Austin v. United States*, 509 U.S. 602 (1993), this Court did not

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[1] On remand in the civil case, the State obtained summary judgment on two offenses, other than the ones Leyva pled guilty to, based on the same overall facts. Appendix 26c.

[2] Relatively small, but not the 99.968% discount involved here. Leyva was a core enterprise member for three years. Appendix 25c. Enterprise membership under the statutes is not as expansive as Respondents assert (Opp. at 5), but its boundaries were not tested in this case because Respondents never contested their joint and several liability below.

foreclose parallel civil remedies that are not based on criminal culpability concepts. Rather, only the portion of a civil remedy that is in fact punitive is to be analyzed for excessiveness. Civil remedies may constitutionally remain independent. This Court should provide guidance on the distinction between punitive and remedial civil sanctions and, if found applicable, on the calculation of the amount of a punitive civil sanction that is permitted by the Constitution.

ARGUMENT

I. THE CONFLICTS AMONG STATE AND FEDERAL COURTS RELATING TO THE APPLICATION OF THE EXCESSIVE FINES CLAUSE ARE A PROPER BASIS FOR GRANTING A WRIT OF *CERTIORARI*.

Respondents do not dispute that there are conflicts among the state and federal courts relating to the application of the Eighth Amendment Excessive Fines Clause. Since the Petition was filed, those conflicts have become more pronounced in both state and federal courts.

The Utah Supreme Court has recently taken an approach to application of the Excessive Fines Clause that is similar to that of the Arizona Court of Appeals. In *Real Property at 633 East 640 North, Orem, Utah*, 2000 WL 38480 (January 19, 2000), the Utah Supreme Court held that a civil forfeiture assessed by the trial court could not be sustained. It ignored the threshold question whether and to what extent the civil forfeiture was remedial, treated the determination of proportionality as essentially the same as a criminal sentencing, and failed to address the

process of setting the forfeiture at a constitutionally permissible level. It simply denied any forfeiture after determining that forfeiture of the entire property would be excessive.[3] The Utah Supreme Court then applied a multi-factor test based on *United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995), including the defendant's assets. 2000 WL 38480 at 3.

The Eleventh Circuit has taken a position directly contrary to the Arizona Court of Appeals, the Utah Supreme Court and the Ninth Circuit on this issue, stating, "[m]ore important, we do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment." *United States v. Dicter*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) (citing *817 N.E. 29th Dr., Wilton Manors, Florida*, 175 F.3d 1311 (11th Cir. 1999)). Moreover, Respondents in this case have conceded that the Arizona Court of Appeals' consideration of the civil defendants' assets in determining whether this civil forfeiture is "grossly disproportionate" was erroneous. (Opp. at 2-3.)

This Court's guidance is needed to clarify that only the portion of a civil forfeiture that is punitive is subject to Excessive Fines Clause review and that the multi-factor test should not include many of the factors included in the *El Dorado* formulation, including consideration of the defendant's assets.

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[3] The Utah Attorney General's petition for a writ of certiorari in the Utah case is due April 19, 2000.

II. THE STATE HAS NOT CHANGED ITS POSITION WITH REGARD TO THE NINTH CIRCUIT'S TEST FOR PROPORTIONALITY.

Respondents incorrectly assert that the State agreed in the court of appeals that the test set forth in *El Dorado* is correct, and that the State has therefore "waived its right to proceed further." (Opp. at 4.) The court of appeals' emphasis on the common ground it found in the parties' briefs does not mean that the State has changed its position or even that the common ground was substantial.

Petitioner discussed *El Dorado* in the court of appeals and concluded that *El Dorado* had to be "adjusted." The adjustments it suggested go to the heart of the *El Dorado* opinion. The State adopted the Ninth Circuit's observation that the word "excessive" appears twice in the same sentence of the Eighth Amendment in similar contexts and its conclusion that the Excessive Fines Clause should be read to employ a proportionality standard like the one applicable under the Excessive Bail Clause, in which "excessive" requires proportionality between the amount of bail and the "interest the Government seeks to protect," *i.e.*, the risk of flight. 59 F.3d at 983 (quoting *United States v. Salerno*, 481 U.S. 739 (1987)). The State noted that in proceeds forfeiture cases the interests the government seeks to protect are: (1) the prevention/control of the conduct giving rise to forfeiture by disgorgement of the property acquired through the conduct (or an equivalent amount of money); (2) reducing the economic incentive to engage in the conduct and depriving the illegal industry of necessary capital; (3) compensation for the conduct's injury to the State, including its effects on the economy;

and (4) rededication of forfeited assets to remedial purposes, citing Ariz. Rev. Stat. Ann. ("A.R.S.") §§ 13-2314(A) and 13-2318. The State emphasized that these interests do *not* include punishment of "criminal culpability," citing *Bennis v. Michigan*, 516 U.S. 442 (1996), *United States v. Ursery*, 518 U.S. 267 (1996), and A.R.S. § 13-2318. The State concluded that proportionality should be between the forfeiture and the actual or potential injury to the State. See Appendix 65f-67f (Petitioner's Opening Brief in Arizona Court of Appeals, at 34-35). It summed up its criticism of *El Dorado* by stating:

> The net effect of judicial treatment of a civil forfeiture as a criminal sentencing is to *create* a criminal sanction out of a civil sanction. If some form of criminal culpability/knowledge/intent is constitutionally required to avoid excessiveness, then the most purely remedial civil theories of recovery, such as spousal and donee liability in proceeds forfeiture cases and entrustment and agent liability in facilitation forfeiture cases, are constitutionally forbidden. . . . The holdings of *Bennis* and *Ursery* cannot be squared with this view of *Austin*.

Id. at 70f-71f. (Emphasis in original). The test that the State proposed was based on the *El Dorado* test only in the way that a sculpture is based on the original block of granite. What is removed is as important as what remains. Of the factors listed at 59 F.3d at 985-86, those that remained after the State's analysis were only: "the value of the property and the harm caused or threatened by the illegal activity, including at least (a) the amount of

drugs and their value; (b) the duration of the illegal activity; and (c) the effect on the community." *Id.* at 71f.

The State's Reply Brief renewed its criticism of the Ninth Circuit's approach. It stated:

> The view of the State is that civil remedies, with the exception of those defined as "fines" in *Austin v. United States*, 113 S.Ct. 2801 (1993), serve objectives that are separate from the objectives of criminal prosecution. In this view, the objective of civil sanctions is to prevent and remedy the effects of specified damaging conduct, the conduct to which civil liability may attach is defined by the broader civil concepts of financial responsibility rather than by individual criminal culpability and the assessment of sanctions flows from the same considerations as those applied to assessment of money judgments in civil tort cases. This view is reflected in the wording and structure of the statutes enacted by the Arizona Legislature and relied upon by the State in this case.

See Appendix 74g (Petitioner's Reply Brief in Arizona Court of Appeals, at 1-2). The State concluded, "[i]f the Eighth Amendment Excessive Fines Clause means that the Constitution forces the punitive world view on the Executive and Legislative Branches, independent civil remedies have been an evolutionary experiment that is no longer constitutionally viable." *Id.* at 75g.

Thus, the State has consistently objected to the Ninth Circuit's misinterpretation of *Austin* as viewing forfeitures as adjuncts to criminal punishment.

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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APPENDIX F

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III. THE TRIAL COURT APPLIED INCORRECT CRITERIA IN ITS DETERMINATION OF "EXCESSIVENESS" IN THIS CASE.

A. Foundations For An Appropriate Test.

Federal courts have applied various tests for "excessiveness" since *Austin*. The Ninth Circuit test is found in *United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995). *El Dorado* requires a two-prong inquiry. The first is an instrumentality test, which inquires whether there was a sufficiently close nexus between the property and the conduct giving rise to forfeiture, as described by Justice Scalia's concurring opinion in *Austin*, 113 S.Ct. at 2812-2815, and elaborated in *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995). In proceeds cases the nexus is obviously sufficient by definition – the amount of the proceeds is the very amount of liability.

The *El Dorado* court then requires a proportionality inquiry. Because that court, writing after *$405,089.23* and before *Bennis v. Michigan*, 116 S.Ct. 994 (1996), and *Ursery*, understood *Austin* as requiring courts to treat civil forfeiture as though it were criminal punishment, it identified the proportionality question as whether "forfeiture . . . would be *grossly disproportionate* given the nature and extent of [claimant's] criminal culpability." 59 F.3d at 985. (Emphasis added). Now that it is clear, after *Bennis*, that there need be no culpability at all, and, after *Ursery*, that

the *Austin* Court did not adopt the sweeping definition of punishment found in *$405,089.23, El Dorado* must be adjusted.[13] The foundation, however, is sound.

As the Ninth Circuit pointed out in *El Dorado*, the word "excessive" appears twice in the same sentence of the Eighth Amendment in similar contexts. Therefore, "the Excessive Fines Clause should be read to employ a proportionality standard as does the Supreme Court's interpretation of the Excessive Bail Clause, in which the Court reads 'excessive' to require proportionality between the amount of bail and the "interest the Government seeks to protect," *i.e.*, the risk of flight. 59 F.3d at 983, quoting *United States v. Salerno*, 481 U.S. 739 (1987). In proceeds forfeiture cases, the interests the government seeks to protect are: (1) the prevention/control of the conduct giving rise to forfeiture by disgorgement of the property acquired through the conduct (or an equivalent amount of money); (2) reducing the economic incentive to engage in the conduct and depriving the illegal industry of necessary capital; (3) compensation for its injury to the State, including its effects on the economy; and (4) rededication of forfeited assets to remedial purposes. A.R.S. §§ 13-2314(A) and 13-2318. They do *not* include

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[13] The Ninth Circuit's view of excessive fines clause limitations remains at odds with other circuits. The process has now returned to the Supreme Court in *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996), *cert. granted, United States v. Hosep Krikor Bajakajian*, No. 96-1487, 1997 WL 134399 (May 17, 1997). Although that case involves a criminal forfeiture and therefore will not resolve the issue of the application of *Austin* to the civil forfeiture in this case, it will certainly provide clearer guidance on the factors to consider in determining excessiveness.

punishment of "criminal culpability." *Bennis*, 516 U.S. 994; *Ursery*, 116 S.Ct. 2135; A.R.S. § 13-2318. The proportionality should therefore be between the forfeiture and the actual or potential injury to the State, including the measures of damage in A.R.S. § 13-2318 and the general damages like those described above, mentioned in *Harmelin v. Michigan*, 501 U.S. 957, 1002-3 (1991).

The idea of considering factors based on the blameworthiness of the property owner beyond that required by the forfeiture cause of action, if any, is based on the perception that forfeiture is comparable to criminal punishment, a perception advanced by the Ninth Circuit's misinterpretation of *Austin* as viewing forfeitures as adjuncts to criminal punishment. This has been entirely undercut by *Bennis'* re-affirmation that there is no constitutional requirement that the property owner be culpable at all,[14] by *Ursery's* affirmance of the very clear distinction between civil and criminal in *89 Firearms;* by *Ursery's* clarification that *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994), did not create a class of cases that are civil but entitled to treatment as though they were criminal; and by *Ursery's* recognition of the civil nature of deterrence and the entirely remedial nature of proceeds forfeiture. Thus, under a test like that in *El Dorado*, the "culpability" involved with an offense should be considered as it relates to the *harm* that was or could have been done, but not as it relates to the personal

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[14] "The Court's holding today is dramatically at odds with our holding in *Austin v. United States*." *Bennis v. Michigan*, 116 S.Ct. 994, 1010 (1996) (Stevens, J., dissenting).

characteristics of the person or persons involved. Likewise, the "culpability" of the property owner is not a permissible justification of a forfeiture to the extent that it depends on personal factors such as criminal history, personal background, likelihood of recidivism, lack of remorse or evil intent beyond whatever state of mind is required for liability, *if any*. Similarly, the criminal sentence that could have been imposed should be considered only as a very general barometer of the Legislature's general classification of the harm. Finally, the subjective "hardship" on the claimant is entirely irrelevant.[15] In other words, the damages should be computed as they would in any tort action, after adjustment for the fact that injury to the State is not the same as injury to property or to an individual.

Removal of the personal "guilt" and "punishment-worthiness" factors is appropriate. These considerations follow *Solem v. Helm*, 463 U.S. 277, 290-291 (1983), which employed three factors, (1) the inherent gravity of the offense, (2) sentences imposed for similarly grave offenses in the same jurisdiction, and (3) sentences imposed for the same crime in other jurisdictions. Individually and collectively, they are a logical dead end in civil forfeiture.

The entire concept of "gravity" of conduct is often inapplicable to a judgment of forfeiture. Most civil forfeitures do not even require actual moral culpability of an

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[15] It would also lead to unjustifiable results. A large judgment against a person without assets is no hardship, since it is uncollectible, but against a person with assets it is a great hardship. Thus the rich would be protected.

owner as an element. Forfeiture may result from negligence or from conduct by a morally blameless person, like the law firm that was the unsuccessful claimant of proceeds of crime in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). A morally blameless state of mind is no defense to forfeiture, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); and has no role in setting the judgment amount. In these Arizona forfeitures, the property owner need not be involved in any way, and there need be no actual criminal offense. A spouse of the person obtaining the proceeds and a donee of racketeering proceeds are both financially responsible regardless of "guilt." There is not necessarily any moral wrong or "gravity" to compare with the amount of the judgment.

Many civil forfeitures, like actions for negligent personal injury, cannot be meaningfully compared with other "similar conduct" on a relative "gravity" rating, or with other sanctions for "similar conduct." Two spouses of financiers may be equally ignorant of their marital partner's business, but may face drastically different liability because of the purely fortuitous circumstance that one of their spouses is advising a drug cartel and the other's spouse is engaged in a legitimate business. Of two property owners who are given property by people under equally innocent circumstances, one may learn that the source of the gift was legitimate while the other may learn that the gift is subject to forfeiture because it was the proceeds of drug sales. Focus on the culpability of the owner and the owner's personal background ignores the remedial and compensatory function of forfeiture. The

gravity of "similar conduct," like the gravity of the unfortunate selection of a ship captain/crew member, *United States v. Brig Malek Adhel*, 43 U.S. 210 (1844) (owner of ship financially responsible for acts of crew), or tenant, *Dobbins Distillery v. United States*, 96 U.S. 395 (1877) (owner of land and building financially responsible for conduct of lessee), is comparable only by the *result*, not by negligence without result. Forfeiture cannot be meaningfully compared with other sanctions for "similar conduct."

The criminal sentencing process takes account of the personal characteristics of the defendant. Age, family and marital status, personal history, criminal record, potential for violence or recidivism, acceptance of responsibility, remorse, perceived or predicted response to prison or other sanctions are considered. None of these facts have any necessary bearing on a forfeiture. All claimants are assessed the same measure. None can be assessed an "aggravated" judgment or a "mitigated" judgment. Sentences in other jurisdictions are as irrelevant as sentences in Arizona, so *Solem v. Helm's* final factor is as useless as the other two.

The net effect of judicial treatment of a civil forfeiture as a criminal sentencing is to *create* a criminal sanction out of a civil sanction. If some form of criminal culpability/knowledge/intent is constitutionally required to avoid excessiveness, then the most purely remedial civil theories of recovery, such as spousal and donee liability in proceeds forfeiture cases and entrustment and agent liability in facilitation forfeiture cases, are constitutionally forbidden. What began in *Austin* as a limit on those cases that *do* require criminal culpability under the

statute invoked would be converted into a rule that all forfeitures *must* require criminal culpability. The holdings of *Bennis* and *Ursery* cannot be squared with this view of *Austin*.

Basing the proportionality test on the goals of the Government, as required by *Salerno*, the *El Dorado* factors listed at 59 F.3d at 985-86 would include only the value of the property and the harm caused or threatened by the illegal activity, including at least (a) the amount of drugs and their value; (b) the duration of the illegal activity; and (c) the effect on the community. The criteria for determining excessiveness have not been announced by the Supreme Court or by any Arizona court. Appellant submits the criteria used by the trial court for review in this case.

B. The Trial Court's Incorrect Criteria.

The parties stipulated that the Somoza enterprise acquired no less than $10 million in marijuana proceeds during the time the defendant was a core member of the conspiracy. (IR 295, IR 306D) The trial court was therefore obligated to assess a judgment of at least $10 million, subject to the constitutional prohibition against excessive fines. (IR 306D P.4) The court framed the issue as follows: "The only issue remaining is whether the $10 million *in personam* judgment the State is now seeking is an excessive fine." [IR 298]. However, the trial court limited the judgment to $50,000, giving as its reasons its opinion that the culpability of the defendant was not proportionate to the proceeds acquired by the enterprise, that the financial effect of such a judgment would be "unduly harsh" on

the defendants, in particular that the judgment would work a lifetime indenture, and that there were other conspirators involved. (IR 306D at 5) None of these factors are appropriate in this case.

APPENDIX G

Reply Brief
10/16/97
Pages 1-2

I. INTRODUCTION.

The broad question presented in this case is the scope of the constitutional "excessive fines" limitation on the size of a civil judgment obtained by the government in a civil action brought to remedy illicit business conduct that is economically harmful to the public. The constitutional answer to this broad question will be a major factor in the direction of the continuing evolution of civil remedies as a governmental tool in the control of conduct that is harmful to the public health and safety.

Government use of civil remedies has evolved rapidly in the past quarter century. The law enforcement field is only one of many in which civil judgments have been sought by public representatives to protect or define the rights of citizens through judicial action. The application of civil remedies in the law enforcement field has met diverse reactions within the executive branch, from the judiciary and from legislators. On the issue presented in this case,[1] observers are divided between two

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[1] The evolution has been somewhat fragmented by controversial social issues. For example, the employment of civil remedies in drug enforcement has split advocates on the issue of the proper governmental role, if any, in the problem of drug abuse. In forfeiture cases, the balance between the need for expediency and the employment of seizures without prior judicial process has split advocates for and against such governmental authority. *See, e.g. United States v. James Daniel Good Real Property,* 510 U.S. 43 (1993). The broad question

contrasting views of the role of civil remedies in actions brought by government representatives. The view reflected in *United States v. $405,089.23*, 33 F.3d 1210 (9th Cir. 1994), *rev'd sub nom, United States v. Ursery*, 116 S.Ct. 2135 (1996), and in *United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995), is that civil remedies like forfeiture are simply another way of punishing criminals, brought in separate proceedings but otherwise indistinguishable from fines. In this view, the objective of civil forfeiture sanctions is punishment, the conduct to which liability may attach is limited to individual criminal culpability and the assessment of sanctions must flow from the same considerations as those applied to sentencing in criminal cases. The view of the State is that civil remedies, with the exception of those defined as "fines" in *Austin v. United States*, 113 S.Ct. 2801 (1993), serve objectives that are separate from the objectives of criminal prosecution. In this view, the objective of civil sanctions is to prevent and remedy the effects of specified damaging conduct, the conduct to which civil liability may attach is defined by the broader civil concepts of financial responsibility rather than by individual criminal culpability and the assessment of sanctions flows from the same considerations as those applied to assessment of money judgments in civil tort cases. This view is reflected in the wording and structure of the statutes enacted by the Arizona Legislature and relied upon by the State in this case.

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presented in this case cuts across all subdivisions because the answer will apply to all government civil cases seeking judgments in all areas.

The fact that criminal prosecution and civil actions are generally consistent with some of the same goals, such as reduction of the incidence of criminal conduct, does not negate the reality that they are in many ways based on competing world views, one punitive and the other remedial.[2] If the Eighth Amendment Excessive Fines Clause means that the Constitution forces the punitive world view on the Executive and Legislative Branches, independent civil remedies have been an evolutionary experiment that is no longer constitutionally viable.

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[2] Holmes, *Forfeiture Achieves Proper Purposes By Appropriate Means*, 39 N.Y. Law Rev. 335 at 365-371 (1994).